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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

11 Cr. 836 (KBF)

5 YESID RIOS SUAREZ,

6 Defendant.

7 -----x  
8 New York, N.Y.  
9 June 27, 2014  
3:10 p.m.

10 Before:

11 HON. KATHERINE B. FORREST,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA  
16 United States Attorney for the  
Southern District of New York  
17 ADAM FEE  
SEAN BUCKLEY  
Assistant United States Attorneys

18 JOHN MERINGOLO  
19 ANJELICA CAPPELLINO  
20 Attorneys for Defendant

21 ALSO PRESENT: MIRTA HESS, Interpreter (Spanish)  
22  
23  
24  
25

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(Case called)

MR. FEE: Good afternoon, your Honor. For the government, Adam Fee, and with me is AUSA Sean Buckley.

THE COURT: Good afternoon, both of you.

MR. MERINGOLO: Good afternoon, your Honor, John Meringolo and Anjelica Cappellino for Yesid Rios Suarez.

THE COURT: Good afternoon to both of you. The Court notes that Mr. Rios Suarez is present and here in court this afternoon. Good afternoon, sir.

We are assisted today with the services of a Spanish interpreter and I see, Mr. Rios Suarez, that you are using the equipment. If at any point in time that equipment is not functioning right, then let Mr. Meringolo know or just make a motion to the Court and we will get it fixed. Sometimes the batteries can run out. And we want to make sure that you are able to hear every word. All right?

THE DEFENDANT: Okay. Yes.

THE COURT: We are here today for the sentencing of Mr. Yesid Rios Suarez and I want to first start out by reciting for the record the materials that I have received in connection with this proceeding. I have read them thoroughly and they were extensive, but I do think that it laid out a variety of issues that are useful to have laid out, and we will go through them, but I warn you all, this may take a little while.

I received a copy of a defense submission, it was 87

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1 pages, dated May 23, 2014, and attached to that submission was  
2 a compendium of a number of exhibits, a couple of dozen  
3 exhibits, including letters from family and friends, as well as  
4 some additional supportive material to which Mr. Meringolo  
5 referred in his submission.

6 He also sent the Court a copy of his objections to the  
7 PSR, which is a letter dated June 11, 2014. A number of those  
8 objections had not been reflected in changes by probation,  
9 though probation refers to that letter and explains their  
10 rationale, and we will go through those as well. And Mr.  
11 Meringolo also made a third submission, which is a reply to the  
12 government's submission, and that's dated June 16, 2014, and  
13 there are an additional seven exhibits attached to that. I've  
14 got all of those, and we are going to go through those in a  
15 little bit.

16 Separately the Court has received a copy of a  
17 presentence investigation report. That is referred to as a  
18 PSR.

19 Mr. Meringolo, did you have an opportunity to review  
20 the PSR with your client?

21 MR. MERINGOLO: Yes, I did.

22 THE COURT: And do you have objections to the PSR  
23 apart from those which you set forth in your submissions?

24 MR. MERINGOLO: None other than them.

25 THE COURT: We will go back over that in a moment.

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1 The PSR notes an offense level of 43 and a criminal history  
2 category of I. The PSR will be made part of the record in this  
3 proceeding. It will be filed under seal. If an appeal is  
4 taken, counsel on any appeal may have access to the PSR without  
5 further application to the Court.

6 The government also made a submission dated June 9,  
7 2014. Now, I've thought about procedurally how we ought to  
8 proceed. And what I thought may make the most sense is to  
9 first take Mr. Meringolo's letter of June 11, go through it.

10 Then what I would like to do is, I will explain to you  
11 which factual findings I'm adopting in the PSR. Then what I'd  
12 like to do is to go through a number of the other issues which  
13 relate to the offense level calculation before we get to  
14 statements because my view is many of the arguments that people  
15 may want to make may be embedded in what the Court determines  
16 as to whether the evidence is supportive or not supportive of  
17 some of those facts. So rather than having ships passing in  
18 the night, I'd like us all to be on the same page in terms of  
19 where my head is.

20 That's my plan. I will let counsel then respond to  
21 the offense level calculation first. We will then reach  
22 resolution on that. Then go to statements of counsel and then  
23 to Mr. Rios Suarez, if he would like to address the Court  
24 before sentence is imposed.

25 Does that seem like a reasonable way to proceed?

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1 MR. FEE: It does, your Honor. Certainly seems the  
2 most efficient.

3 MR. MERINGOLO: Yes. Thank you, your Honor.

4 THE COURT: Let me just take Mr. Meringolo's letter  
5 first.

6 MR. FEE: Your Honor, I'm sorry. I will just note and  
7 apologize. The government submitted a letter to probation  
8 responding to Mr. Meringolo's letter. It did not copy the  
9 Court. It should have. It really will add nothing. It mostly  
10 cited your prior order, just so the Court knows.

11 THE COURT: That's fine.

12 If you want to make some comments, we will take the  
13 letter first. If you want to make comments afterwards, before  
14 we get to the other matters, then you can.

15 Several of the objections were supported by the  
16 Court's factual findings which were made by a preponderance of  
17 the evidence in the Fatico. But certain statements were not.  
18 Paragraph 8, I believe, should remain unchanged because it's  
19 supported by factual findings and testimony, not only findings  
20 in my decision, but can be supported and I do find that it's  
21 supported by a preponderance of the evidence based upon  
22 testimony and other evidence adduced at the Fatico.

23 This is also true for paragraph 9, as well as for  
24 paragraph 10 and 11. There are facts which were adduced during  
25 the Fatico hearing which are supportive of those statements by

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1 a preponderance of the evidence and I so find.

2           However, I do find that paragraph 12 and the next  
3 paragraph, which is labeled 13, which is, in fact, a piece of  
4 12, and so I have noted, that's not actually paragraph 13.  
5 It's a paragraph 12, I believe. So 12 and 12.

6           I do agree that those two are not directly supported  
7 in the manner in which they are worded in the PSR. We are  
8 going to talk about other facts which get at many of the same  
9 points and these, frankly, do not affect the offense level  
10 calculation and we will talk about that. This is really, I  
11 think, more of a wording issue in terms of how probation  
12 decided to refer to certain facts. But I do agree that those  
13 two should come out. And then I similarly find the same for  
14 what's referenced on page 2 of Mr. Meringolo's letter as  
15 paragraph 14, which should be changed to paragraph 13. That's  
16 a reference to paragraph 13 in the PSR.

17           It is possible that the PSR changed numbers between  
18 the first draft and what I have seen and that Mr. Meringolo's  
19 letter may have referred to a prior draft. In any event, it is  
20 the second, third, and fourth paragraph on the pages where I  
21 will agree to strike the referenced language. That will be  
22 noted for probation and that should be -- Ryan, you should make  
23 sure that Joe knows that, to put that on the equivalent of a  
24 blue card.

25           Paragraph 15 and paragraph 16, those are supported by

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1 the facts adduced at the Fatico hearing. That's the Court's  
2 findings as to Mr. Meringolo's letter.

3 Mr. Fee, is there anything in particular that you want  
4 to say about the Meringolo letter? Let me suggest, it's  
5 possible that you may want to hear the rest of what I have to  
6 say to figure out if it changes in any way your view. In other  
7 words, I think we come to the same point in terms of the  
8 overall conduct, whether it's worded in terms of a particular  
9 person or not.

10 MR. FEE: I have nothing to add right now, your Honor.  
11 Thank you.

12 THE COURT: So the Court does adopt the factual  
13 findings of the PSR with those amendments as stated.

14 Moving on to the next point, what I want to do now, as  
15 I said, is go through certain aspects of Mr. Meringolo's filing  
16 and give you my rulings on the various points raised. But I  
17 want to also state that I would like to hear comments from you,  
18 if you want to make comments afterwards. And it's not that I'm  
19 suggesting that I wouldn't change my mind if counsel raised  
20 something that suggests that I have erred in some way.

21 These are my rulings in the absence of you folks  
22 convincing me otherwise. First, I want to deal with the burden  
23 of proof issue, which is one that goes through a number of  
24 different pages of Mr. Meringolo and is particularly relevant  
25 to the quantity argument.

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1           Mr. Meringolo suggests that the burden of proof is  
2 beyond a reasonable doubt versus preponderance of the evidence.  
3 I do not agree. I believe that that it is taking the Gonzalez  
4 case, which is 420 F.3d 111, and the Apprendi case too far.  
5 There have been arguments similar, frankly to that which Mr.  
6 Meringolo makes, and I don't fault him for making the argument.  
7 But it is no longer supportable in the case law.

8           The argument is that a court which makes a finding  
9 relating to an offense level that increases the offense level  
10 to a point which raises a statutory maximum or even a statutory  
11 minimum must be found by a beyond a reasonable doubt standard.  
12 In the pre Booker world that was obviously much more important  
13 because if the offense level changed as a matter of statutory  
14 equivalence, that would change the range within which a  
15 defendant had to be sentenced. It is nonetheless still  
16 important to the extent that there are statutory minimums, for  
17 instance, in our situation attached to certain crimes.

18           If it were the case that the evidence relating to the  
19 imposition of the statutory minimum or maximum was something  
20 which had not been allocuted to, as it has here, or otherwise  
21 in a trial with respect to, there could be an issue as to  
22 whether it is by a reasonable doubt, beyond a reasonable doubt  
23 or preponderance. In such a case it may well be a beyond a  
24 reasonable doubt standard.

25           Here, however, the only statutory minimum issue that



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1 we have has been allocuted to, which is the five kilos, which  
2 provides the basis for the imposition of the statutory minimum.  
3 We don't get to a statutory maximum here and so, therefore, the  
4 other aspect is not relevant.

5 The law is clear that where the facts which are at  
6 issue are simply going to the offense level calculation and is  
7 not otherwise impacting a statutory minimum or maximum, that  
8 that is proven by a preponderance of the evidence. There are  
9 two cases which actually deal with arguments very like Mr.  
10 Meringolo's from the Second Circuit directly on point. One is  
11 the Lighten case, 525 Fed. App. 44 pin cite 48, (2d Cir. 2013),  
12 and also the Vaughn case, 430 F.3d at 518 at pin 525 (2d Cir.  
13 2005).

14 The calculation of the offense level for Mr. Suarez in  
15 this situation, the facts that we are dealing with for the  
16 enhancement and for the quantity are facts which we find by a  
17 preponderance of the evidence. Mr. Rios Suarez himself  
18 allocuted to five kilos or more. He allocuted to the minimum.  
19 And, therefore, there is no debate as to that. That's not  
20 contested. That's the first issue I wanted to deal with.

21 The second issue that I wanted to deal with is the  
22 calculation that we are going to get through. It's going to be  
23 several different pieces that will go to the quantity. The  
24 quantity actually in many of the arguments in the defense  
25 submission stem from arguments about the defendant's role. And

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1 I did find in the Fatico decision by a preponderance of the  
2 evidence that the defendant, his role was of a leader.

3 Now, the defendant has argued, based upon his  
4 allocution at the plea, that his role in the conspiracy was  
5 really a relatively minor role. In fact, he is given two  
6 different examples or characterizations of his role. I would  
7 note that his allocution went into his role when it didn't have  
8 to. It wasn't an element of the offense. He chose to do so.  
9 He was under oath at the time. And he allocuted to simply  
10 filling the plane with fuel, actually planes because he also  
11 stated that planes, in the plural, went to the Southern  
12 District of New York.

13 He separately then, in his defense submission and also  
14 in the PSR, stated that he sold fuel to a drug trafficking  
15 organization from which he made 10 to \$20,000 a month. So  
16 those are the two different roles.

17 I actually find that neither of those roles are  
18 credible based upon a preponderance of the evidence. However,  
19 if one credited his view of his role, then he would have been a  
20 low member of the conspiracy to whom the quantities might be  
21 different and the various enhancements might well not apply.

22 So his arguments as to enhancements in quantity really  
23 flow ultimately from, in large part, but not exclusively, the  
24 Court's determination as to his role. Again, it's not an  
25 element of the offense and, therefore, his role the Court can

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1 find by a preponderance of the evidence, and I do find that he  
2 was a leader in this drug trafficking organization.

3 I make that finding based upon the evidence adduced at  
4 the two-day Fatico hearing which we had. The Court heard at  
5 that time from two credible witnesses whose testimony I  
6 actually credit in all respects. That is Mr. Garzon Garzon,  
7 and Mr. Ramirez-Pajon. I think that's right. And that those  
8 individuals both testified credibly that Mr. Rios Suarez was a  
9 leader of the drug trafficking organization and they gave some  
10 details relating to their interactions with him in that regard.

11 I don't intend right now to go back all over the  
12 factual findings which I made in the Fatico. I would note that  
13 those findings were all made by a preponderance of the  
14 evidence, as I stated in that decision itself.

15 I find, in addition, when Mr. Rios Suarez was a leader  
16 of that drug trafficking organization that he was involved in  
17 essentially all aspects of that conspiracy. He was  
18 knowledgeable by inference, by reasonable inference drawn from  
19 his role and drawn from the role which was testified to by  
20 these two credible witnesses to have any knowledge of the  
21 various activities of the conspiracy and, in particular, of the  
22 manufacturing and distribution operations of that organization.

23 The Court does find by a preponderance of the evidence  
24 that he would have understood that there was cocaine being  
25 manufactured in the laboratories on site in substantial

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1 quantities, that there were armed guards who were present in  
2 and around that facility, that there were airplanes which were  
3 used and filled with the cocaine which then flew to various  
4 destinations, including, among others, the United States, but  
5 as to which even as to the others, the United States was  
6 typically a destination. As Mr. Garzon testified, the vast  
7 majority of the cocaine was destined for the United States.

8 So I do find that Mr. Rios Suarez was not, in fact,  
9 telling the truth during his allocution. That does present  
10 some issues in terms of a potential obstruction of justice  
11 enhancement which has not been raised. Under the guidelines  
12 for enhancements, obstruction of justice can be imposed for not  
13 telling the truth, for lying to the Court in the context of  
14 either a sentencing submission or otherwise.

15 I decline, though I think I could, to impose an  
16 obstruction of justice enhancement. I just note it as a  
17 possibility. It's a cautionary tale for those individuals who  
18 put more facts into their allocutions than they need to to  
19 establish the elements of the offense to which they are  
20 allocuting. If the Court later determines that there was a  
21 statement under oath with which it does not agree and it was  
22 not necessary to establish an element of the offense, then that  
23 fact can be used in the manner that I have described to support  
24 an obstruction of justice enhancement.

25 Let me move on to the quantity. This brings us now to

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1 the quantity and there is quite a bit of argument, as there  
2 should be in this kind of case, because the quantity really  
3 drives the base offense level. So I think, by the way, that  
4 these arguments are appropriate. I think they are suggestive  
5 of Mr. Meringolo having raised a number of issues, which this  
6 case is all about the appeal. This case is all about  
7 establishing the appropriate record for Mr. Rios Suarez if he  
8 wants to take an appeal. And so I think that Mr. Meringolo, I  
9 don't fault him at all for having raised these arguments. I  
10 say that because I know this is going to take a while, again.  
11 I'm smiling.

12 In the Fatico decision I found that the defendant had  
13 been involved in a conspiracy that involved thousands of kilos  
14 of cocaine, and I laid out the facts in that Fatico decision.  
15 I confirm those now, but I want to confirm something else. I  
16 want to confirm foreseeability in particular by this defendant  
17 of the thousands of kilos. I went back into the Fatico  
18 decision and did not find a particular reference to  
19 foreseeability by the defendant.

20 Quantity can be determined in two ways. It can be  
21 determined both by foreseeability of an individual who is  
22 participating in a conspiracy. It can also be established by  
23 direct participation. Here we have evidence of both and it  
24 matters really not at all whether we do one or the other. Even  
25 based on Mr. Rios Suarez's own allocution to having filled

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1 planes with fuel, the planes were testified to credibly here  
2 during the Fatico by Mr. Garzon Garzon to hold several hundred  
3 kilos apiece. So even filling one plane with fuel that had  
4 several hundred kilograms of cocaine would be sufficient to  
5 establish the base offense level that we are talking about,  
6 even with the guideline amendments that will occur in  
7 potentially September of 2014.

8           However, there is more than that. I make the further  
9 determination that because the defendant was directly involved  
10 and it was reasonably foreseeable to him as a leader of this  
11 drug trafficking organization that the drug trafficking  
12 organization would have manufactured and distributed more than  
13 150 and indeed more than 500 kilograms of cocaine.

14           As I stated, I base that finding on his role. He was  
15 one of two primary leaders. I think that his nephew was  
16 probably the bigger leader of the two. That's only based on  
17 the characterization of the evidence. You can have one big  
18 leader and you can have another leader, or you can have two  
19 leaders of the same level. He was a leader, nonetheless. All  
20 evidence is supportive of him having been involved. He was  
21 responsible for manufacturing aspects of the cocaine. He  
22 certainly would have known how much they would have  
23 manufactured. I find by a preponderance of the evidence that  
24 he was involved in the manufacturing of the cocaine.

25           There was credible evidence that he was involved in

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1 deals with Mr. Ramirez Pajon that involved thousands of kilos  
2 of cocaine. He himself allocuted to there being planes, not  
3 one plane, but many planes. And all of the evidence, again,  
4 points by a preponderance of the evidence to there being  
5 thousands of kilos and I so find.

6 The defendant also argues that he should have only  
7 attributed to him the amount of cocaine as to which the  
8 evidence supports U.S. distribution. And I found this as a  
9 somewhat interesting issue.

10 So it turns out that the Second Circuit has carefully  
11 discussed the Azeem case, 946 F.2d 13 (2d Cir. 1991) in a  
12 manner in which they determines did not overrule it, but, in  
13 fact, suggested it's not really the law as they see it.

14 In any event, I find that the case here, the situation  
15 here is sufficiently distinguishable from Azeem that Azeem  
16 would not apply. Let me know go back over that. As an initial  
17 matter the Court does not think and no party has raised that  
18 there is any question that it has jurisdiction over this case.  
19 This is a conspiracy, the conduct of which involved directly  
20 involved the United States. It involved bringing cocaine into  
21 the United States. The defendant himself allocuted  
22 specifically to distribution in the United States. There also,  
23 of course, was testimony as to the conspiracy.

24 But the question goes, I think, to whether or not,  
25 under the Azeem case, somehow the quantity of drugs which are

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1 outside of the United States can be attributed to the defendant  
2 for purposes of calculation of amount.

3 Now, under 2D1.1, application note 5, if there is no  
4 seizure, then the Court is to approximate the amount of drugs.  
5 I would also say see also U.S. v. McLean, 287 F.3d 127, 133 (2d  
6 Cir. 2002). The Court does that as set forth there by a  
7 preponderance of the evidence.

8 Now, in Azeem there was an indication there and it was  
9 an odd case because it happened while the defendant had had  
10 some conduct preguidelines, and then he was arrested and  
11 suddenly the guidelines were in place and there was one set of  
12 conduct in the United States that occurred at one time frame  
13 and another set of conduct that was outside of the U.S. at  
14 another time frame. One can reasonably wonder how those  
15 particular circumstances impacted the Court's determination.  
16 But there there was language which indicated that distributions  
17 which were not found to have been in the United States may not  
18 be attributable to the overall quantity calculation.

19 That, however, has been specifically clarified in the  
20 U.S. v. Greer case, which is 285 F.3d 158, 179 (2d Cir. 2002).  
21 There, in U.S. v. Greer, the Second Circuit made it clear that  
22 the Azeem case is really limited to "foreign crimes" and that  
23 is the language with the Azeem case stated.

24 In U.S. v. Greer, indeed the Second Circuit found that  
25 in a conspiracy where there was a defendant being prosecuted in



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1 the United States, it was, in fact, error requiring  
2 resentencing to fail to include quantities that were  
3 distributed in foreign jurisdictions.

4 Here, the Court notes this precedent and I, therefore,  
5 suggest that irrespective of where the cocaine was distributed,  
6 whether in the U.S. or whether outside of the U.S., it is all  
7 part of the overall conspiracy here and, under U.S. v. Greer,  
8 is includable.

9 Nevertheless, the Court makes the alternative finding  
10 that there is a sufficient amount, in any event, to reach the  
11 same base offense level if one is to take only the  
12 approximation under 2D1.1, application note 5, which allows the  
13 Court to approximate the quantity based upon the testimony, for  
14 instance, of Mr. Garzon, which would be itself in the thousands  
15 of kilos. He said the vast majority reached the United States.  
16 If one takes even 51 percent and so takes a mere majority of  
17 that quantity, one reaches, let's just say that thousands of  
18 kilos equals only 3,000 kilos and one takes only something over  
19 1500 kilos. One is nonetheless well north of either 150 kilos  
20 for a base offense level of 38, or 480 kilos or 500 kilos, or  
21 perhaps revised quantity tables under the Smarter Sentencing  
22 Act, which would increase the quantity to get to a base level  
23 of 38.

24 Whether the U.S. only quantity is included or whether  
25 the U.S. plus foreign quantity is included, we end up at the

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1 same place because the quantities are so vast that we end up,  
2 however we divide it, still north of that which is required to  
3 reach the base offense level.

4 Also, Mr. Ramirez-Pajon himself talked about various  
5 loads and, of course, he talked about Puerto Rico being one of  
6 the destinations of that. So I find by a preponderance of the  
7 evidence that under any determination there are over 500 kilos  
8 attributable and, in fact, thousands.

9 Let's go on to the enhancements. The defendant argues  
10 that the Court should not impose enhancements relating to  
11 leadership role, use of an airplane other than a  
12 regularly-scheduled commercial flight, use of a firearm,  
13 direction of the use of violence, criminal livelihood. And the  
14 Court dealt with these issues in the Fatico decision. I  
15 reiterate that I found that each of these was appropriately and  
16 sufficiently supported by facts which I found by a  
17 preponderance of the evidence.

18 Now, the defendant also argues that he should obtain  
19 the two-level downward adjustment based upon the potential  
20 Smarter Sentencing Act and the potential downward adjustment  
21 and quantities. But this is often something taken into  
22 consideration during plea negotiations. And here, of course,  
23 that's a whole other issue, but that is not something which has  
24 resulted in it.

25 However, given where we are with the overall offense

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1 level, that two-level downward adjustment would be applied to  
2 the overall calculation prior to the Section 5, application  
3 note 3, I think it is, which says that you have an offense  
4 level that is higher than 43, you bring it down to 43. Here we  
5 end up at 50, or you can say we end up at 48, or you can say we  
6 end up at 46. Either way, once you take off the two points, no  
7 matter what happens, you never end up north or at 43. The  
8 Holder two-level adjustment doesn't actually affect in any way  
9 the overall offense level.

10 I am going to go to the calculation based upon those  
11 findings and tell you about the calculation.

12 The defendant argues strongly that the calculation  
13 that the Court imposes should be based upon that which was  
14 extended to the defendant during an earlier plea offer set of  
15 negotiations, that the defendant, on the day that the plea was  
16 to expire, changed counsel. Mr. Meringolo came in. These are  
17 CJA appointed counsel in both instances, that Mr. Meringolo did  
18 not have sufficient time to acquaint himself with the facts.  
19 He moved with alacrity but was unable to recommend to his  
20 client that his client take the plea agreement before the  
21 period of time in which he did so.

22 I'm not suggesting that Mr. Mention's actions should  
23 have been different than they were, but I would suggest that  
24 the premise of ineffective assistance up until that point is  
25 inaccurate. Let me describe for you why that is so. As an

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1 initial matter it's important to note that even if there had  
2 been a plea agreement here and even if that plea agreement had  
3 been one which Mr. Rios Suarez had pled to, the Court always  
4 retains its own discretion to make a sentencing determination  
5 that it deems appropriate under the various factors of 3553(a).  
6 The Court is not bound by a plea agreement. The Court is not  
7 bound by the stipulated-to offense level. The Court is not  
8 bound by the stipulation between the parties as to what  
9 enhancements do or do not apply. This Court has found in the  
10 past and then affirmed by the Second Circuit government on the  
11 application of enhancements, which neither party has sought and  
12 which the defense has specifically objected to in the context  
13 of the Court applying enhancements not agreed to as part of the  
14 plea agreement.

15 The Second Circuit in cases in which I have been  
16 involved and also in a number of other cases has reaffirmed the  
17 very basic proposition that the Court is not bound by a plea  
18 agreement and the Court has an independent obligation to  
19 calculate the offense level and otherwise to make both an  
20 objectively and substantively reasonable determination as to  
21 the appropriate sentence.

22 I say that because irrespective of the plea agreement  
23 arrived at, it would not have placed the defendant in any  
24 position other than that in which he is placed today.  
25 Therefore, he suffers no prejudice because the Court would have

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1 gone through the same analysis today that it is, in fact, going  
2 to go through as it would have under either the current set of  
3 circumstances, where defendant pled to the indictment and that  
4 in which the defendant had the benefit of a plea agreement,  
5 which suggested to the Court a stipulated offense level and did  
6 not have enhancements included.

7 In addition, let me just say that according to  
8 3553(a), even today, the sentence will be determined based upon  
9 the Court's decision as to a sufficient but not greater than  
10 necessary sentence, and that is done, frankly, irrespective of  
11 the guidelines. It's done taking the guidelines into account.  
12 They are advisory only. I do not assume that the guidelines  
13 are necessarily reasonable for any particular defendant. I use  
14 them as a guidepost and I consult them as I need to do, but  
15 ultimately what the plea agreement says about the guidelines is  
16 only one of several factors that the Court takes into  
17 consideration in its 3553(a) analysis.

18 Getting to the plea discussions, the defendant  
19 concedes that a plea offer was extended to him. Typically,  
20 when ineffective assistance of counsel is raised in the context  
21 of plea issues, it's a situation in which a plea offer has not  
22 been extended or the terms of a plea offer have not been fully  
23 explained or in which a counsel has, for whatever reasons,  
24 determined not to recommend one way or another the acceptance  
25 or rejection of a plea offer.

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1           Those are the typically the three bases on which  
2           ineffective assistance of counsel claims are based in the  
3           context of plea discussions, and I refer you to U.S. v. Brown,  
4           623 F.3d 104 at pin 114. It's the Second Circuit case, 2010.

5           In cases with respect plea discussions and ineffective  
6           assistance of counsel claims are found to have been joined,  
7           that issue has been joined, the Second Circuit indicates that  
8           the appropriate remedy is to ensure the defendant is placed  
9           back into a position which he would have been in had the plea  
10          offer been extended.

11          I have suggested to counsel now that, frankly, the  
12          defendant is in no worse position today because of the 3553(a)  
13          analysis driving my determination in the fact that I would have  
14          and would always consider the very same enhancements that we  
15          have and we will discuss today, irrespective of the plea  
16          agreement, so the defendant is in no worse position.

17          In any event, putting that aside, the chronology here  
18          does not support, in the Court's view, ineffective assistance  
19          of counsel. It's clear that a plea offer was made, but the  
20          terms of the plea offer were translated into Spanish. That was  
21          discussed specifically on the record and that the defendant,  
22          for whatever reason, chose not to take the plea offer at that  
23          time.

24          Indeed, Ms. Aubrey Lees, who was counsel at that time,  
25          indicated that it had been discussed a number of times with

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1 Mr. Suarez. So this is not a situation in which the offer was  
2 not extended, where the terms of it were conveyed. It's that  
3 Mr. Meringolo was more persuasive than Ms. Lees or, for  
4 whatever reason, the defendant himself decided to take it at  
5 one point but not at another. That's not ineffective  
6 assistance. That's not the basis for an ineffective assistance  
7 claim. That's the basis to suggest that for whatever reason  
8 the defendant made a determination at one point in time and not  
9 at the other.

10 But the government has every right to set deadlines.  
11 They had every right to stand by the deadline. And the fact  
12 that Mr. Rios Suarez had not accepted the agreement by a  
13 particular point when the deadline expired, that does not an  
14 ineffective assistance of counsel argument make, even though  
15 counsel changed. That was known on that day. He could have  
16 accepted it before Ms. Lees transferred off. She was not  
17 replaced because of any kind of incompetence. She was replaced  
18 for all of the reasons that were set forth on the record that I  
19 won't go over now. I do believe that she was competent and  
20 responsible in her conduct as the legal representative of  
21 Mr. Rios Suarez.

22 There is the further issue of the public policy  
23 implications of the Court finding that a defendant by merely  
24 switching counsel can get the benefit of an extension of a plea  
25 offer. That would be the Court imposing itself into the plea

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1 negotiations in a way that would have broad policy implications  
2 for the U.S. Attorney's Office. It's not appropriate for the  
3 Court generally ever to participate in the plea negotiations,  
4 so I decline to find that I should have in any way here.

5 Let me address acceptance of responsibility. The  
6 defendant argues he should be entitled to a three-level  
7 reduction, which includes both a two-level reduction under  
8 3E1.1(a) and (b). As we all know, you only get the 3E1.1(b)  
9 reduction if you get the 3E1.1(a) reduction. I do not find  
10 that the defendant gets a 3E1.1(a) reduction and, therefore,  
11 he's not entitled to the (b) reduction.

12 The reason for that is the fact of a plea does not  
13 ipso facto in and of itself guarantee that a defendant will get  
14 an acceptance of responsibility adjustment. There has to be a  
15 clear acceptance of responsibility.

16 Here, the defendant has himself come up with a couple  
17 of different reasons, different explanations as to his role  
18 and, in fact, has spent quite a bit of time both at the Fatico  
19 and his very extensive submissions here arguing as to why he  
20 doesn't have the kind of responsibility that he has.

21 So there is ample reason, extensive reasons why he is  
22 not entitled to any acceptance of responsibility under  
23 3E1.1(a). So he doesn't get not only the one, but he doesn't  
24 get any of the three. I find that fact by a preponderance of  
25 the evidence. He simply didn't truthfully admit his conduct.



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1           He also argues for departures based on his age and  
2 family. In fact, he doesn't have particularly unusual  
3 circumstances as to age or family. The defendant is 46 years  
4 old. That's not particularly old. He has got a family. It's  
5 no doubt tragic that he is not there for them. He has got a  
6 son who has got some health issues. That unfortunately, while  
7 sad, is not particularly unusual, and I decline to depart for  
8 those reasons.

9           Based upon all of the above and everything that I have  
10 said so far, the calculation as to offense level is as follows:  
11 The base level I find is under 2D1.1(c)(1) is 38. That is 150  
12 kilograms or more. I would note that as I found under a  
13 preponderance of the evidence, even with the proposed  
14 adjustments under the Smarter Sentencing Act, under the  
15 findings I have made, the offense level would be 38, even next  
16 year. A dangerous weapon was possessed. I found that in the  
17 Fatico, and I reiterate that now. Under 2D1.1(b)(1), that is a  
18 two-level enhancement. He directed the use of violence under  
19 2D1.1(b)(2). It's another two-level enhancement. That's  
20 something that we again found in connection with the Fatico.

21           He imported cocaine with the use of a non regularly  
22 scheduled aircraft that was dealt with in the Fatico under  
23 2D1.1(b)(3). It's another two-level enhancement. He was  
24 directly involved in a pattern of criminal conduct. I found  
25 that as part of the Fatico under 2D1.1(b)14(C) and (E). It's

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1 another two-level enhancement. He was a leader of the  
2 organization and under 3B1.1(a), that's a four-level  
3 enhancement.

4 All together, that leads to an adjusted offense level  
5 of 50. Under 5A, application note 2 -- it wasn't 3, as I  
6 previously said. It is 2. As I see it now in my notes and I'm  
7 not reciting it from memory -- if the total offense level  
8 exceeds 43, it becomes 43, so it's 43.

9 Now, the Court notes that even if I had deducted two  
10 levels for the Smarter Sentencing Act, it would be 48, because  
11 it would have started with 50 and it would be 48. In addition  
12 to that, if I also gave three points for the acceptance of  
13 responsibility, it would go from 48 to 45. We would still end  
14 at 43, criminal history category of I.

15 Counsel is welcome to comment now on any of the above.  
16 We will go on to the 3553(a) any mitigation statements in a  
17 moment. Let's deal with any comments you have on these  
18 arguments. I note that by not commenting now as to particular  
19 points, it does not waive them. Your submissions are part of  
20 the appellate record and so you don't have to regurgitate all  
21 of the argument. If you think I've gotten something wrong as a  
22 matter of law, I would certainly like to hear about it.

23 Mr. Fee.

24 MR. FEE: Your Honor, the government has no comments  
25 and notes that the calculation as pronounced is correct, in our

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1 view.

2 THE COURT: Mr. Meringolo.

3 MR. MERINGOLO: No, your Honor. We will rely on the  
4 papers.

5 THE COURT: Thank you.

6 Let's go on to counsel's statements. I think that  
7 I'll deal with some of the other points: The Colombian  
8 conviction, the extradition letter, unwarranted sentencing  
9 disparities, and credit for time awaiting extradition. I'll  
10 deal with those in my comments.

11 Let's go on now to what you have to say, Mr. Fee, Mr.  
12 Meringolo, and Mr. Rios Suarez, if he would like to address the  
13 Court before sentence is imposed.

14 Mr. Fee.

15 MR. FEE: Thank you, your Honor. I will remain brief.  
16 The Court has obviously immersed itself in this case.

17 I'll speak principally as to the factor we stressed in  
18 our submission under 3553, specifically the seriousness of the  
19 offense, the need to promote respect for the law, and to impose  
20 just punishment.

21 Put simply, your Honor, this defendant is exceptional,  
22 both in the sense of the crime he committed and in the broader  
23 sense of the types of defendants who find themselves in a U.S.  
24 Court subject to punishment.

25 This defendant was immersed at the core of the

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1 international drug trade for years, your Honor, decades,  
2 really. And what he did, along with his cousin and the rest of  
3 their coconspirators, including, many, many employees, as this  
4 Court heard, was managed a vertically integrated, extensive,  
5 both in time, geographical area, and scope, and sophisticated  
6 drug trafficking organization.

7 It went from the ground to the air, meaning through an  
8 alliance with the FARC, guerrillas, a guerrilla group in  
9 Colombia, they were able to obtain crops, coca plants from  
10 farmers in Colombia, process them in labs first in Colombia  
11 that were overseen by this defendant and others in his  
12 organization, take what was processed in those labs, cocaine,  
13 hydrochloride or powder cocaine, move them over land, and put  
14 them on planes and send throughout the world, including most of  
15 the time to the United States, your Honor. This is how cocaine  
16 gets to the streets.

17 This defendant and his work is how it results in  
18 addiction, to street gangs dealing cocaine or crack. This is  
19 how it gets there, your Honor. And the hallmarks of the  
20 extremely serious nature of this offense are reflected here in  
21 this defendant, meaning that the reasons why drug laws in the  
22 United States or penalties for drug offenses in the United  
23 States are so serious, specifically why penalties for the  
24 importation of cocaine do present some of the more significant  
25 punishments in our system, are seen in this defendant's

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1 conduct.

2           Number one, as I discussed, the scope of his  
3 organization was immense. Thousands of kilograms of cocaine  
4 that this Court has found and, as the witness have testified  
5 to, shipped out of Colombia and Venezuela, through various  
6 shipping points and sometimes directly to the United States,  
7 millions of dollars of proceeds coming back to this defendant  
8 and his cohorts. You heard testimony about that as well, that  
9 the money always came back on those planes in the form of U.S.  
10 dollars and that these deals were lucrative for  
11 Mr. Ramirez-Pajon as well as Mr. Garzon Garzon. There was a  
12 lot of money flowing back to the defendant and that's why he  
13 did all this.

14           Beyond the organization, your Honor, the alliance with  
15 other criminal organizations. Here it's the FARC. It's one of  
16 the reasons why this is just about the most serious drug  
17 offender I could imagine coming before this Court.

18           In order to do this, meaning to engage in an extended  
19 conspiracy to manufacture and transport cocaine, this defendant  
20 made a deal with the devil, so to speak. He aligned himself  
21 with a group in Colombia that is a terrorist group, as  
22 designated by the U.S. State Department and as really  
23 practically you can see even from the evidence in this case.  
24 It's a group that used violence to impose control over broad  
25 swaths of Colombia and it used the drug trade and alliances

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1 with people like Mr. Rios Suarez to enrich that group.

2 And Mr. Rios Suarez embraced, as you heard, the FARC.  
3 He had meetings with the most senior leaders of that group. He  
4 allowed them access to the air strips that he used to transport  
5 cocaine and sometimes to the laboratories that he used to  
6 manufacture. And he continued to have as his calling card in  
7 this conspiracy the fact that he was able to manage a  
8 relationship with and to form alliances with these guerrillas  
9 who were violent and working against the government of Colombia  
10 in the most flagrantly violent ways, as this Court heard.

11 I think that's the final hallmark of the extremely  
12 serious nature of this offense, is violence. This defendant  
13 embraced, sometimes in a casual manner, the use of violence to  
14 protect his drug business. You heard testimony about this that  
15 we submit was credible and both striking in the things this  
16 defendant did throughout his life to maintain the sanctity of  
17 his business and to ensure that no one else would be  
18 interfering with it.

19 You heard about the most extreme forms of violence,  
20 this defendant directing others to murder innocent people.  
21 When I say innocent, all murders are extremely serious, but  
22 people who essentially happened upon this defendant, organizing  
23 or working together with the FARC to carry out an attack on a  
24 Colombian pipeline. And these, as the testimony characterized,  
25 were simply farmers. And this defendant elected at that time

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1 to tell others to murder those two men, and they were murdered.

2 You heard other examples of the violence suffusing  
3 this defendant's criminal career, including being involved in  
4 the transport of ransom payments for kidnappings that had been  
5 carried out by the FARC and then payments brokered by this  
6 defendant to get back to him related to this conspiracy in the  
7 broader sense, that it was part and parcel his relationship  
8 with the FARC, and those guerrillas were the drug partners.

9 You heard also about weapons, this defendant  
10 possessing them and others possessing them. Of course, as I  
11 referenced, the concluding moment of Mr. Garzon Garzon's work  
12 as a confidential source was this planned bombing. And this  
13 was the level of power and hubris and sort of greed that this  
14 defendant reached at his time in Colombia, that first chapter  
15 of his career, that he was actually working with the FARC to  
16 drop bombs on Colombian military and oil pipelines, the thought  
17 being that dropping them on the pipeline would distract the  
18 military from his narcotics trafficking operation in the same  
19 region and, more directly, attacking the military would limit  
20 their effectiveness in narcotics interdiction efforts.

21 Your Honor, these are all comments about the record.  
22 The Court is certainly well aware of the record. The reason I  
23 recite some of is this is to emphasize and to highlight that  
24 that is a rare opportunity to have a man like this defendant  
25 sitting in a U.S. courtroom, somebody who we can actually say

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1 for years and years and years engaged in a conspiracy to spread  
2 cocaine throughout the world and including into the United  
3 States, purely for profit and to do it in an incredibly callous  
4 matter, meaning he adopted violence as one of the tools of his  
5 trade, and we have heard a few instances. But it is fair to  
6 infer that this was customary for Yesid Rios Suarez and his  
7 coconspirators both in Colombia and Venezuela, when they were  
8 running this drug trafficking organization.

9 I will just briefly touch on some of the arguments I  
10 expect Mr. Meringolo to raise on his behalf. I'm not going to  
11 go into detail on factual arguments made by defendant through  
12 Mr. Meringolo, and I think the Court has hit this squarely,  
13 even just taking the defendant's statements, either through his  
14 counsel to probation or in allocuting his guilt to this Court,  
15 he is simply not credible.

16 And I do think it is appropriate that the Court deny  
17 him credit for acceptance of responsibility, because he has not  
18 accepted responsibility. In fact, he has attempted to divert  
19 this Court's attention from the actual evidence in this case  
20 and the actual crimes he committed.

21 And I bring that up to highlight that this is not a  
22 man or person for whom this Court should impose a sentence in  
23 light of the consideration of mercy. This defendant spent  
24 years committing crimes, serious crimes, including murder, use  
25 of weapons, and, of course, trafficking cocaine. He now finds



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1 himself in a position where it is time to be called to account  
2 for what he has done.

3 And his response is not to direct his comments to the  
4 substance of his crimes or even to ask the Court plainly for  
5 some amount of mercy. It is, instead, quite frankly, to lie  
6 and try to push the Court away from what it now knows to be  
7 true.

8 Your Honor, we would ask that based on all of the  
9 3553(a) factors that this Court impose a sentence well in  
10 excess of 360 months, which is a number we only use because it  
11 is the bottom end of the top guidelines range. It is  
12 appropriate in this case, both based on what this defendant has  
13 actually done and this Court has learned through the evidence  
14 adduced at the hearing, as well as to send a clear signal about  
15 what it means for someone like this defendant, who worked for  
16 so long to do so much wrong, to be held to account in a United  
17 States court. Thank you, your Honor.

18 THE COURT: Mr. Meringolo.

19 MR. MERINGOLO: Thank you, your Honor.

20 Mr. Fee offered my client a plea which would have been  
21 168 to 210 months. Unfortunately, at that time I was not  
22 competent to advise my client, which I did so, to take that  
23 seven days later.

24 But after that plea offer that Mr. Fee gave my prior  
25 counsel and my client, the evidence that he started to gather

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1 to prosecute this case for trial was he interviewed -- I  
2 believe he went to Colombia and he interviewed a member of the  
3 FARC. And that member's name was Sofia Cardona. And what  
4 Sofia Cardona told Mr. Fee is a blatant contradiction to what  
5 he just proffered to the Court. She told Mr. Fee that my  
6 client was not a member of the FARC. She told Mr. Fee and  
7 Mr. Fee wrote down that Commander Grand Nobles had a debt. My  
8 client had a debt to Commander Grand Nobles. And she went to  
9 collect that debt on behalf of the FARC as a member of the  
10 FARC.

11 Mr. Rios Suarez, and this, I believe, is in the  
12 handwritten notes from Mr. Fee, Mr. Rios Suarez began to cry  
13 and he offered his 200 dairy cows, two farm tractors, two  
14 trucks, two horses, water tanks, and construction equipment.  
15 If this man was in the drug business for all these years, he  
16 had no access to money, he had Commander Grand Nobles send a  
17 member of the FARC to his house, put his life and his family in  
18 jeopardy.

19 Also, if he was so powerful, your Honor, if he was so  
20 powerful, what's evident here is his brother was killed from  
21 the FARC, his brother-in-law and his nephew were kidnapped and  
22 disappeared. They bombed his mother's house. They kidnapped  
23 his brother.

24 If this is what we are saying is equivalent to Pablo  
25 Escobar, these things do not happen. Maybe he gets killed. He

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1 didn't pay that debt. He did not pay that debt to the FARC.

2 And what happened? Honestly, I've dealt with  
3 criminals my entire life. I may be duped. I don't know what  
4 else to tell the Court. I know the Court didn't accept  
5 responsibility for what my client said. But this is evidence  
6 that we have here, your Honor.

7 This gentleman, Mr. Garzon Garzon, although the Court  
8 deems credible, and in this case, under the Extradition Act,  
9 the Court can only sentence my client from 1997 until, I guess,  
10 present day, my client was in jail for three years from the  
11 beginning of 1998 to 2001 and then on house arrest.

12 Mr. Garzon stopped cooperating in 2001. He was taken  
13 off the street. And then we had the next witness that your  
14 Honor heard. He only dealt with my client in Venezuela from  
15 2007 to 2008. We have these things. It defies logic and  
16 common sense. It's bizarre how the government can come and  
17 literally have allegations and just drop somebody in there.

18 This is not an individual that's ordered murders. You  
19 will see all the letters. We are dealing with the entire  
20 family through a translator. These are decent people. These  
21 letters are well written. We are not saying he's an angel, and  
22 he's not. But these murders and this violence. Across the  
23 board people that we have spoke to that maybe we couldn't put  
24 letters in or represent. This is obscene, what's going on here  
25 as far as the violence, your Honor.

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1 I think when we take into consideration all the  
2 3553(a) factors, and, like I said, the family, I think that  
3 should be taken into consideration. The sentence the  
4 government wants, he will never see his family again. I hope  
5 that's taken into consideration.

6 The torture that he received in both the prisons, both  
7 in Venezuela and Colombia, it's heavily documented that this  
8 occurs. It's heavily documented that there is many, many  
9 deaths. My client was subjected to intense torture, and all  
10 the family, this multi million dollar trafficking organization,  
11 all his wife could come up with, after getting from all the  
12 family members \$12,000. He was on the brink of death and  
13 that's all they could come up with. Now he has made all these  
14 hundreds of millions of dollars, according to the government.  
15 I think that's preposterous.

16 I also would like the Court to take into consideration  
17 that Mr. Garcia, a/k/a Camillo, and I believe Mr. Garzon said  
18 that he was a member of the FARC, a high-ranking member, and in  
19 this particular situation the boss of my client, he goes to  
20 trial in the United States. He loses at trial and he gets 24  
21 years. I respectfully request the Court not to sentence my  
22 client more than somebody above him who went to trial and lost.  
23 We tried our best to come in before this Court and accept  
24 responsibility. We have tried our best not to prevent the  
25 trial. I don't know if we are going to discuss the three years

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1 he did from '98 to 2001 and the 100-month conviction from what  
2 we deem, your Honor, is virtually the same crime as we are  
3 prosecuted here. Mr. Garzon was a key witness during that  
4 time. He didn't testify that there was any murders.

5 Unlike this country, he was paid specifically on  
6 information that he gave to the Colombian government for  
7 specific crimes, specific allegations. He doesn't ever proffer  
8 to murders until he sees Mr. Fee 14 years later. I am not  
9 saying there is any improprieties. This guy decides to do this  
10 14 years later. This guy didn't go to the government.  
11 Mr. Rios Suarez has been in jail since 2010. He knew that. He  
12 never came forward and said these murders, but for when we  
13 decided to go to trial, two weeks after we decided to go to  
14 trial, potentially. I think the Court should take into  
15 consideration the 100 months as relevant conduct that he has to  
16 serve.

17 And in Colombia, from what I've been told by the  
18 Colombia lawyers, there is no good time. He is going to serve  
19 100 months in Colombia. Whatever sentence he gets here, which  
20 we respectfully request should be consistent with his boss, he  
21 still has to go to Columbia and serve 100 months.

22 Mr. Rios Suarez, I don't know him prior to being  
23 assigned to this case. He has been very respectful to me and  
24 to my entire staff and to my students, as some defendants are  
25 and some defendants are not.

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1 But the allegations of the government, just from  
2 dealing with him, as the Court will know, I believe, in my  
3 opinion, and I could be duped and that's fine. I've been duped  
4 before and I will be duped again, but I think these allegations  
5 of violence are unfounded. And I believe that they should  
6 listen to the members of the FARC that they have proffered and  
7 not people who come up with these violent allegations 14, 15  
8 years after cooperating.

9 With that said, your Honor, we are under the  
10 guidelines and, how these cases are prosecuted, we are asking  
11 for the lowest sentence possible.

12 THE COURT: Thank you.

13 MR. MERINGOLO: Thank you.

14 THE COURT: Thank you, Mr. Meringolo.

15 Mr. Fee.

16 MR. FEE: Your Honor, just briefly. There are a  
17 number of statements that I don't think were based on the  
18 record in Mr. Meringolo's comments to the Court. I won't go  
19 through them detail by detail. I just want to note that's what  
20 the record reflects, that we do dispute most of the comments he  
21 made. I will just note one.

22 Your Honor, the government did not accuse this  
23 defendant of being a member of the FARC. I think Mr.  
24 Ramirez-Pajon may have believed he was during his testimony and  
25 that's where Mr. Meringolo gets that from. Our view of the

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1 facts is that he aligned himself with the FARC. To our  
2 knowledge, he was not, in fact, a member. Thank you.

3 THE COURT: Mr. Rios Suarez, would you like to address  
4 the Court before sentence is imposed?

5 THE DEFENDANT: Yes, your Honor.

6 First of all, I would like to apologize to God and  
7 also apologize to your Honor for the damage that I've done.  
8 However, I would like for your Honor to know that I have never,  
9 ever been involved with any murders. I would also like to ask  
10 for forgiveness for my family because of the pain and suffering  
11 that I have caused them because of not being able to be with  
12 them. I will just ask of you, your Honor, and the government  
13 of the United States for one more opportunity. May God bless  
14 you.

15 THE COURT: Thank you, Mr. Rios Suarez.

16 Let me just describe how the Court arrives at its  
17 determination as to what is a sufficient but not greater than  
18 necessary sentence. I have to consult the guidelines and I  
19 have. We have discussed the offense level calculation and the  
20 criminal history category.

21 The Court's sentence is primarily driven by the  
22 statute, the federal statute, 3553(a), which asks the Court to  
23 look at a number of factors, each of which I have looked at.  
24 If I don't recite each and every factor in terms of its magic  
25 words now, I want to assure everyone that I always read 3553(a)

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1 before every sentencing to make sure that I've actually covered  
2 each of its various aspects.

3 In general, the statute requires the Court look and  
4 evaluate the nature and the circumstances of the offense, that  
5 it also look at the history and the characteristics of the  
6 defendant and ask itself, what is just punishment? What is  
7 appropriate punishment? What is punishment which serves the  
8 ends of justice for a particular sentence? What kind of  
9 sentence promotes respect for the law? What type of sentence  
10 actually evaluates appropriately the seriousness of the  
11 offense?

12 And will both do what is necessary in terms of  
13 personal deterrence in terms of general deterrence, and in  
14 terms of providing a defendant with any needed educational,  
15 medical, vocational or correctional treatment that might be  
16 appropriate. And I've looked at these and evaluated them. And  
17 let me describe the Court's thinking on these factors now.

18 In terms of the nature and the circumstances of the  
19 offense, I do believe that it's difficult to overstate the  
20 seriousness of the offense. I'm not going to focus on any  
21 violence that was used. I have made those findings by a  
22 preponderance of the evidence.

23 But what I want to focus on is the drug trafficking.  
24 The drug trafficking was very significant. It was very large.  
25 Mr. Fee has described it. There are only a few defendants who



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1 can control as much cocaine as Mr. Rios Suarez was able to  
2 control and whose actions impact the United States as directly  
3 as his have.

4 His actions directly brought cocaine, large amounts of  
5 cocaine into our communities. There are people who snorted  
6 that cocaine, who used that cocaine in a variety of ways, who  
7 became addicted to cocaine, who died from cocaine, whose  
8 families suffered because of the cocaine, who themselves lost  
9 their jobs because of cocaine, who ended up hospitalized  
10 because of cocaine. There are nameless people. And those  
11 people were on the other end of the dollar transactions or the  
12 peso transactions, or whatever denomination of currency was  
13 used for those transactions. They were real people. They were  
14 people who made a choice perhaps to engage in the taking of  
15 cocaine, but they were people.

16 And our communities are destroyed and their fabric is  
17 deteriorated when we have people with such addictions. The  
18 addictions themselves are ultimately things which are enabled  
19 and assisted by the cocaine which is distributed into our  
20 communities and it's the large-scale distribution which  
21 provides such a very, very pernicious platform for that.  
22 Addictions also lead to crime. They lead to the deterioration  
23 of families.

24 The toll is just enormous. So here we do have a  
25 defendant whose actions were quite extensive and whose

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1 distribution was quite extensive and where the impact on the  
2 United States was very, very serious. This was a way of life  
3 for the defendant. He made his choices. And he made his  
4 choices in terms of the way in which he chose to make a living,  
5 the manner in which he chose to live his life for that number  
6 of years prior to his arrests, and he now has to pay the  
7 consequences of those choices.

8 I think Mr. Rios Suarez, by all accounts, in the  
9 Court's view, is an intelligent man. I think he understood the  
10 consequences. I think he understood the choices he was making.  
11 He is in prison and I don't think it's probably much of a  
12 surprise that he's in prison, although, he, I'm sure,  
13 undoubtedly wishes things turned out differently and he wasn't  
14 in prison. That would be a very human emotion.

15 The defendant, however, finds himself where he is, at  
16 the end of this long road, having made these choices, and I am  
17 here now to weigh the seriousness of the offense and to  
18 determine the appropriate penalty.

19 The defendant's submission stated that there was no  
20 danger to the American public and I want to take issue with  
21 that because in an abstract sense of geographic location of the  
22 defendant himself, if he were not in American prison, in terms  
23 of him, if he were cabined off and not distributing cocaine, I  
24 don't disagree. When we have a defendant whose cocaine  
25 distribution directly reaches into the United States, he does

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1 directly impact and he does directly endanger our communities,  
2 and I take that into account. His extraterritorial conduct  
3 directly affects the United States.

4 In terms of the history and characteristics of this  
5 defendant, he is a family man. I have no doubt that just like  
6 a lot of people, like a lot of criminals, he is a complicated  
7 man. I am sure he loves his children, loves the people, his  
8 family, the people that are close to him, the people that wrote  
9 letters.

10 The fact that he has committed these crimes does not  
11 mean that he is a person without the ability to love and to  
12 have those kinds of very important human relationships, and  
13 that's a statement of the tragedy that this crime has resulted  
14 in. It's a crime that has tragic consequences for so many  
15 people, including, while by his own personal choice, for the  
16 defendant himself. The conduct here was his chosen profession,  
17 and I've taken that into consideration as well as the fact that  
18 he had a family because he knew he was putting his own liberty  
19 at risk in the manner in which he chose to commit the crime.

20 I do believe that if he were free today, I think he  
21 would return to that conduct. I don't think he would not do  
22 the acts which he has done before. I think that he today would  
23 return to drug dealing if he could. If his contacts were still  
24 available, if he could find the same resources to do what he  
25 had done before, I think he would do it again. There is

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1 nothing in the record that suggests that he would not.

2 I have taken all of this into consideration as well as  
3 the comments I made in terms of the various enhancements, in  
4 terms of his role, in terms of his participation over time in  
5 the criminal enterprise. Long-term pattern of criminal  
6 activity is what I mean.

7 I then ask myself, with all that we said this  
8 afternoon in this now rather lengthy session, what is just  
9 punishment. I want to note now a couple of things. It's  
10 important to say how I have treated things like the Colombian  
11 conviction, his prior time, his extradition letter.

12 In terms of the Colombian conviction in 2010, which  
13 has led to the imposition of another sentence, I don't have any  
14 facts that allow me to test that conviction. I can't test to  
15 what extent it, in fact, overlaps.

16 But, in any event, it is not time that has been  
17 served. It is time to be served. And I don't have anything  
18 which indicates to me that there are no appeals left, that  
19 there are no leniency applications which could be applied for  
20 in Colombia at the termination of the defendant's term here.

21 Therefore, I decline to include facts relating to that  
22 Colombian conviction and relevant conduct, and I decline to  
23 find that the sentence here should run concurrently. I leave  
24 it to the defendant and his legal counsel in Colombia to make  
25 any appropriate applications to the Colombian court a number of

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1 years from now as to how that should be treated.

2 In terms of the unwarranted sentencing disparities,  
3 there were four. The Court found the facts that it finds on  
4 all four. They were all really quite different.

5 In U.S. v. Lopez and Metallo -- hold on. That's  
6 different from the four that were mentioned by Mr. Meringolo.  
7 There was Phanor-Arizabaleta. He wasn't similarly situated.  
8 He served a short period of time, but he had a heart problem,  
9 and then he was going to go serve 20 years in Colombia and he  
10 also happened to be 70 years old. Then Cabrera Cuervas. She  
11 didn't have all of the enhancements, as this defendant, not by  
12 a long shot. She served 200 months or was sentenced to 200  
13 months. Leal Garcia, he also didn't have all the enhancements.  
14 I do note that he was sentenced -- many of his codefendants  
15 were sentenced up to 29 years.

16 Here the defense itself asked for I think 20 years.  
17 But he didn't have all of the enhancements and we looked  
18 through the records there. For Ramirez, he was a government  
19 cooperator, and so he had a 5K that affected him. I don't  
20 think that the Court's sentence should be based upon those  
21 sentences. I would note that the guidelines are to provide  
22 some guidance as to reducing unwarranted sentencing  
23 disparities. They provide some guidance in that regard,  
24 although the Court ultimately looks to 3553(a).

25 In terms of the extradition letter, the Court did

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1 receive a letter dated January 31, 2014 from the Colombian  
2 consulate general that references assurances that the United  
3 States Government provide in connection with the extradition of  
4 this defendant. It states that, among the assurances, that  
5 this defendant shall not be sentenced to life imprisonment.  
6 However, I would argue that the case law is different than that  
7 from which Mr. Meringolo cites. I think he makes that a  
8 statement in terms of spirit of the letter.

9         The defendant argues, effectively, that a term of  
10 years that would equal life would be contrary to the spirit of  
11 the letter and also that the Colombian life expectancy for a  
12 male is 58 years. Since the defendant is 46, it would  
13 resulting in something less than 12 years. Therefore, all of  
14 that should be taken into account.

15         I actually disagree with Mr. Meringolo's reading of  
16 these various matters. I note that I've carefully considered  
17 the extradition letter. I do note the substantial comity  
18 issues involved and implicated. I have looked at the case law  
19 in this area. There are situations in which this type of  
20 letter was similar, but not precisely the same. It has already  
21 been exactly argued on exactly these points, which is, does the  
22 imposition of a sentence which determines a number of years,  
23 but which is lengthy, then one could argue equates to an  
24 effective life sentence, does that violate the terms of the  
25 extradition letter. And the answer by the Second Circuit has

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1     been no.

2             Indeed, in one case Judge Scheindlin actually imposed  
3     a life sentence and pronounced it as life. And while the  
4     Second Circuit indicated that perhaps there should have been  
5     additional statements relating to the comity issues, they  
6     upheld it as not an abuse of discretion. I cite the U.S. v.  
7     Baez case at 349 F.3d 90, pin cite 92 to 93 in that regard.

8             My sentence will reflect my careful consideration and  
9     balancing of the comity issues as well as due deference to the  
10    assurances given by the U.S. Government, but I am ultimately  
11    I'm guided by my obligations as a judge in a separate branch of  
12    government and the factors of 3553(a).

13            Finally, let me address the time served awaiting  
14    extradition. I wanted to know, did he fight extradition?

15            MR. FEE: Yes, your Honor. He opposed it and appealed  
16    the decision.

17            THE COURT: Then I decline to make a recommendation  
18    one way or the other for the Bureau of Prisons in that regard.  
19    I will let the Bureau of Prisons figure out if they are going  
20    to give any time.

21            Ultimately, the determination as to time credit is a  
22    BOP determination. I would say, however, that it's a factor  
23    against getting credit if you've actually fought the  
24    extradition to use the conditions of confinement as a basis for  
25    getting credit. If you're in a four-by-four windowless cell

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1 that's got terrible conditions, you think you wouldn't fight  
2 extradition quite so hard. In any event, that was a decision  
3 that was made by the defendant. He had the right to avail  
4 himself of the appropriate legal processes available in  
5 Colombia in that regard. But I declined under such  
6 circumstances to state whether or not credit should be given.

7 With all of this said and all of these points made, I  
8 am now ready to impose sentence. I would ask you to please  
9 stand, Mr. Rios Suarez.

10 Mr. Rios Suarez, it is my determination, as a federal  
11 judge sitting in the Southern District of New York, based upon  
12 my consideration of all of the factors set forth in 3553(a),  
13 that you be sentenced to a term of years of 54 years. 54 years  
14 will equate to a term of months, that is, I think I've got to  
15 do the math, but it's 54 years. We will do the term in months.  
16 This sentence is sufficient but not greater than necessary to  
17 achieve the various purposes of 3553(a).

18 In the Court's view, while I acknowledge it is  
19 effectively a life sentence, I am not pronouncing a life  
20 sentence. It's 648 months. I'm not pronouncing a life  
21 sentence. And this defendant has the ability to appeal, and  
22 various appeals may reduce the sentence by way of enhancement  
23 reductions. But, in any event, the Court does believe that a  
24 54-year sentence is the appropriate sentence for this  
25 defendant.



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1 I also note that the Colombia consulate general knew  
2 from various cases that it was possible that such a result  
3 could have occurred, because it has occurred in the past,  
4 exactly this kind of issue with respect to the extradition  
5 letter, and the consulate general could have written a  
6 different kind of letter which would have said that there could  
7 not have been an effective life sentence. And that is the U.S.  
8 v. Lopez and Metallo case, 305 Fed. App. 818 at 819. That is  
9 my determination as a determinate sentence of 648 months.

10 You may be seated, sir.

11 The Court also declines to impose a period of  
12 supervised release because this defendant will be deported  
13 following his term of incarceration. There will be a special  
14 assessment of \$100 and the Court does impose a fine of \$1  
15 million, which covers the cost of prosecution as well as the  
16 cost of confinement, as well as a monetary penalty. It is up  
17 to the government to find a way to collect that, but based upon  
18 the evidence provided, there should be resources someplace that  
19 would support such a fine.

20 The defendant is also required to forfeit any property  
21 or proceeds traceable to the offense, if any. I don't know if  
22 there are any that are findable or obtainable. There are no  
23 identifiable victims and, therefore, no order of restitution.

24 Do counsel have any legal or other reason why sentence  
25 should not be imposed as stated?

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1 MR. FEE: No, your Honor.

2 MR. MERINGOLO: No, your Honor.

3 THE COURT: I do order that sentence be imposed as  
4 stated.

5 Are there any open counts? There wouldn't be. He  
6 pled to the indictment.

7 MR. FEE: Yes, your Honor.

8 THE COURT: Mr. Rios Suarez, you have a right to  
9 appeal. Any notice of appeal must be filed within 14 days of  
10 the filing of the judgment of conviction in this matter. If  
11 you can't afford the cost of appeal, you can apply to have  
12 those costs waived by applying to proceed in forma pauperis.

13 Are there any other applications?

14 MR. FEE: Not from the government, your Honor.

15 MR. MERINGOLO: Nothing from the defense, your Honor.

16 THE COURT: We are adjourned. Thank you.

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